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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 254

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, Petitioners,

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONERS

The brief on behalf of respondent contains several statements to which we desire to reply.

I.

RESPONDENT HAS NOT SHOWN THAT ARTICLE I, SECTION 9, CLAUSE 7 OF THE CONSTITUTION IS INAPPLICABLE TO THE MONIES HERE INVOLVED.

In Part A of Point I we stated (pp. 15-16) that this Court "has frequently decided that no judgment or decree of any court can compel the payment of money from the Treasury unless there has been an authorization by Congress," and that "with respect to money which has been deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act, we believe there can be no serious question of the power of Congress to enact such a prohibition" as that contained in Public Resolution 53. In reply, respondent asserts (Brief, p. 31):

> We think it too clear for extended argument that, from the entire purpose and intent of the Act, from the provisions thereof, from the long-continued practice thereunder in which hundreds of millions have been paid out without appropriations, and from the decision of this and other Courts, the monies here involved were not intended to be and have not been covered into the Treasury and are not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution.

It may be admitted that the monies here involved have not been technically "covered into the Treasury." However, it does not follow that the monies are not subject to the appropriation clause of the Constitution. Respondent's argument is erroneous in two major respects. First, this Court has not held, as asserted by respondent (Brief, p. 28), that money not technically covered into the Treasury is not subject to the appro-

priation section of the Constitution. *United States* v. *Johnson,* 124 U. S. 236, upon which respondent relies, is not in point here. The question before the Court in that case was whether the Secretary of the Treasury had authority under certain acts of Congress to settle the accounts of Treasury agents, or whether the auditors at the Treasury could overrule decisions of the Secretary. While it is true that the appropriation provision of the Constitution is mentioned by the Court of Claims in its opinion quoted by this Court, no constitutional question of the power of Congress over money in the Treasury was actually involved. At least it is clear that the Court did not hold ineffective an express command by Congress that money in the Treasury should not be disbursed.

Second, it cannot be asserted that with respect to property held under the Trading with the Enemy Act "hundreds of millions have been paid out without appropriations". By Section 12 of that Act, Congress specifically authorized the disbursements in the following language:

> That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court:

II.

THE CASES RELIED UPON BY RESPONDENT DO NOT SHOW THAT THE RETURN OF ENEMY PROPERTY UNDER THE SETTLEMENT OF WAR CLAIMS ACT IS NOT AN ACT OF GRACE.

Respondent asserts that under the Trading with the Enemy Act "only control, not interest of the owners, was for the time being divested" (Brief, p. 64). *Commissioner of Internal Revenue* v. *Stearns,* 65 F. (2d) 371 (C. C. A. 2d) is cited in support of this assertion. We submit that the *Stearns* case is not contrary to the decisions of this and other courts cited by petitioners at page 32 of their brief.

In that case certain stocks and bonds had been returned by the Alien Property Custodian to the administrator of a German who had died during the period that the property was held by the Custodian. The administrator sold the property and computed his taxable profit upon the value of the property at the time it was received by him. The Commissioner assessed the administrator for a profit based upon the value at the time of the testator's death. The court upheld the action of the Commissioner, stating that, despite the seizure and admitted transfer of title to the Custodian, the former owner retained some "interest" which passed to his administrator. In addition, the court pointed out that since Section 24(b) of the Trading with the Enemy Act directed the Custodian to pay all income and estate taxes falling due upon property in his hands, and since, had the Custodian sold the property, the tax base would have been fixed as of the date of the death of the decedent, no reason could be found for concluding that Congress intended the use of a

different tax base in the event that the property was sold by an administrator after the Custodian had returned it.

Respondent also cites *Williams* v. *Heard,* 140 U. S. 529, in support of a contention that recognition of an international obligation is not an act of grace. Aside from the fact that the return of property authorized by the Settlement of War Claims Act was not in recognition of any international obligation, the case is clearly distinguishable. There the United States had received a sum of money from Great Britain as an indemnity for losses sustained by American citizens through acts of British cruisers. Thereafter the United States made provision for the distribution of this fund. Certain of the individuals who had suffered losses had become bankrupt prior to the distribution. The Court held that the payment should be made to the assignees in bankruptcy because the original claim was to be considered as part of the "estate, debts and effects" of the bankrupts within the meaning of the bankruptcy statute. The Court pointed out that the distribution of this money was not merely a gratuity in the sense that it was purely personal to the individual who had suffered the loss and which would therefore not pass to his estate in bankruptcy. But that it was an act of grace on the part of Congress to provide for the distribution of this fund was clearly pointed out (pp. 537-538):

> True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. *But no*

individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund. (Italics supplied.)

In other words, whether the benefits of any particular act of grace on the part of Congress pass to a beneficiary's heirs or to a beneficiary's estate in bankruptcy or fail altogether on the beneficiary's death are questions which depend for their answer upon the nature of the particular benefit involved. Problems of that sort have no bearing upon the question whether Congress may in its discretion alter, modify or repeal a gratuity.

III.

THE SETTLEMENT OF WAR CLAIMS ACT WAS NOT A RECOGNITION THAT GERMANY HAD MADE SUITABLE PROVISION FOR THE SATISFACTION OF AMERICAN CLAIMS.

Respondent's argument with respect to the Settlement of War Claims Act is based on two false assumptions. First, respondent states that "the United States solemnly agreed in the Treaty of Berlin to release the property when Germany made 'suitable provision' for the settlement of American claims" (Brief, p. 69). Second, respondent argues that "Congress by the Settlement of War Claims Act * * * determined definitely and conclusively that suitable arrangements had been made" by Germany (Brief, p. 18).

The first contention is obviously untenable. The phrase "suitable provision" is found only in Section 5 of the Peace Resolution of July 2, 1921 (Appendix, petitioners' brief, pp. 64-65). A mere reading of that section demonstrates that it constituted simply a dec-

laration by Congress of its policy with respect to seized German property, and was not in any sense a promise or an offer to Germany. Section 5 was in turn embodied in the preamble of the Treaty of Berlin (Appendix, petitioners' brief, pp. 68-70), but the Treaty also contained no promise by the United States to restore the seized property if and when the German Government should make suitable provision for the satisfaction of American claims.

Upon the assumption that the Treaty of Berlin contained a promise by the United States to return all seized property upon Germany's making "suitable provision" for payment of American claims, respondent argues that the Settlement of War Claims Act was a conclusive determination by Congress that Germany had made such a provision. Respondent does not, however, point out when and by what acts the German Government had made the suitable provision. Respondent states (Brief, p. 22) that "the first step in such suitable provision was the Mixed Claims Agreement of 1922." However, the Mixed Claims Agreement was merely a means of ascertaining the exact amount for which Germany was already admittedly liable under its previous promise to pay as contained in the Treaty. The Agreement did not add to or qualify Germany's liability and is devoid of any provision looking toward payment.

Respondent also points to the Winslow Act of March 4, 1923 (petitioners' brief, p. 11, note 3), as a recognition by Congress of "satisfactory progress" of suitable arrangements by Germany (Brief, p. 22). Again respondent fails to show any acts by Germany to substantiate that progress.

Actually, the reports of the Committees of Congress quoted by respondent (Brief, p. 46) show affirmatively

that Congress, in considering the Settlement of War Claims Act, realized that Germany had not yet made "suitable provision." After the Committee on Finance stated that "the United States unquestionably possesses the right to retain this property until Germany has made suitable provision," the Committee set forth the reasons why, in its opinion, the Congress should appropriate money and adopt other measures to compensate for Germany's *failure to make the suitable provision* in question. Otherwise, it pointed out, payments to American claimants would be unreasonably delayed. If, as respondent states (Brief, p. 50), "the clear intent, purpose and expression of the committee was that the provisions which had been made for the payment of American nationals were suitable," the provisions were those of the American Congress and not those of Germany.[1]

IV.

THE POWER OF THE UNITED STATES TO CONTROL THE DISPOSITION OF SEIZED ENEMY PROPERTY WAS NOT AFFECTED BY THE DEBT FUNDING AGREEMENT OF 1930.

Inasmuch as respondent relies upon a supposed definitive disposition of German property by the Settlement of War Claims Act, it is not altogether clear what importance it accords to the Debt Funding Agreement

[1] Respondent infers (Brief, pp. 46, 51) that the cooperation between the representatives of the American claimants and the German claimants in representations to committees of Congress evidences in some undefined manner that Germany had made "suitable provision" for the satisfaction of American claims. However, this cooperation is clearly without legal effect. It constituted neither a contract between the conflicting interests nor one by the United States. The failure of the American claimants to ask Congress that all German property be retained, or that a larger percentage be retained, to protect their interests cannot be deemed an act by the German Government providing for satisfaction of American claims.

of 1930. Apparently, however, respondent argues that that Agreement embodied an additional covenant on the part of the United States to release German property (Brief, p. 98), and that by the so-called security clause the United States renounced its lien upon seized German property,—a lien which had theretofore been carefully preserved in order to safeguard the interests of American claimants.[2]

We believe that respondent's argument is directly opposed to the language of the Agreement and the notes exchanged in connection with it as we have already pointed out in our brief in chief at pages 44-45. Moreover, respondent's construction of the Agreement completely ignores its history, which may be consulted to determine its true meaning. *Cook* v. *United States,* 288 U. S. 102; *Factor* v. *Laubenheimer,* 290 U. S. 276, 295.

The Debt Funding Agreement of 1930 was negotiated in connection with the adoption of the Young Plan by Germany and the governments to which reparations were payable by Germany under the Treaty of Versailles. The subject matter of the Agreement was the payment by Germany of the awards of the Mixed Claims Commission and of its obligations for the costs of the American Army of Occupation.

The first draft agreement contained no security clause. During the negotiations the German representatives suggested that in view of the correlation of the Agreement with the other agreements to be negotiated by Germany with creditor powers, it would be desirable

[2] It may here be noted that the petitioners asserted in their brief (p. 28) that they "are advised by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties." The respondent questioned this statement (Brief, p. 94). Therefore, printed as an Appendix to the present brief is a communication received from the State Department which supports the petitioners' statement.

to include in the Agreement a clause renouncing the sanctions and controls to which the United States might be entitled. In this the German representatives had principally in mind that the German government attached great importance to obtaining from their reparations creditors a formal treaty renunciation of their right under the Treaty of Versailles to impose sanctions in case of voluntary default by Germany on reparation payments under Paragraph 18 of Annex II to Part VIII of the Treaty of Versailles and of their right under Articles 428-430 of Part XIV of the Treaty to occupy territory west of the Rhine "as a guarantee for the execution of the present treaty." There was no indication in the German suggestion that the security clause should in any way affect the disposal by the United States of German property held under the Trading with the Enemy Act.

In reply to the suggestion, the American Government stated in effect that it did not desire to include in a financial agreement a clause which would be more appropriate in a political agreement. Paragraph IV of the Agreement as explained by Paragraphs (a) and (b) of the Exchange of Notes is the result of the compromise of these two views.

The proviso of Paragraph (b) of the Notes did not arise from any reference by the German representatives to seized German property in the United States. There is no indication in the diplomatic history of the negotiations in the records of the State Department that the German representatives ever referred to the seized property. The exchange of notes was, therefore, designed to make clear that the security clause in the Debt Agreement was not intended to affect the powers of Congress with respect to this seized property.

V.

ANY RIGHTS ACQUIRED BY RESPONDENT WERE SUBJECT TO THE PARAMOUNT POWER OF THE UNITED STATES IN THE FIELD OF FOREIGN RELATIONS.

In Point III, subsection B of our original brief we pointed out that if respondent acquired any "contract" right to the return of the property here in question, that contract right must be understood as subject to the implied right of the United States to take action under treaties and statutes then in existence. We also (pp. 45-47) indicated that the so-called contract should be understood to reserve to the United States its sovereign powers in international relations. However, in view of the contentions of the respondent, it may be well to indicate in somewhat more detail the basis for the power of the United States to take measures of this character under international law.

The failure by one nation to meet its international obligations acknowledged to be owing by it to another nation is an international situation which has existed on numerous occasions. In international law, the right to take measures to induce redress by the neglectful nation is well-recognized. A creditor nation may even seize property of a defaulting debtor nation, or of its citizens, hold such property until the debt is paid, or apply the property in satisfaction of the debt if the debtor nation persists in its refusal to pay.[3]

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[3] See Moore, *Digest*, Vol. VII, pp. 119-135; Hallock, *International Law*, Vol. I, p. 503, *et seq.*; Wheaton, *International Law* (Keith Ed., 1929), Vol. II, pp. 623-627; Oppenheim, *International Law* (5th Ed., 1935), Vol. II, pp. 114-123. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, pp. 174-175 states:

> ¶590. THE PRACTICE OF THE UNITED STATES.
>
> The nature and use of reprisals early engaged the thought of American statesmen. Attention was, however, drawn to the policy rather than the rightfulness of such acts. • • •
>
> By reason of the failure of the French Chamber of Deputies

Many illustrations of the exercise of this power by other governments may be cited. One of the most conspicuous examples of the use of these tactics is afforded by the action taken by England in 1934 when Germany announced a moratorium on the service of bonds held abroad. England in retaliation passed legislation enabling her treasury to collect all sums due from British debtors to creditors in defaulting countries and to use these proceeds to satisfy the claims of the British creditors against the defaulting foreign debtors.[4] The result of this legislation was that Germany became willing to negotiate, and agreements between the two governments were finally reached.[5] Unilateral action under this legislation actually was taken against Italy. See Order of July 10, 1936, Statutes, Rules, and Orders 1936, No. 696 (discussed, Board of Trade Journal, Nov. 19, 1936). Switzerland also has used the same expedient. See Act of October 14, 1933, Eidgenossische

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to make the necessary appropriation for the payment to the United States of the first installment, some time overdue, in settlement of the French spoliation claims, in accordance with the terms of the convention of July 4, 1831, President Jackson, in his annual message of December 1, 1834, expressed the opinion that the United States should insist upon prompt execution of the treaty, and in case of a refusal or longer delay on the part of France, should "take redress into their own hands." He declared it to be "a well-settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war." (Footnotes omitted.)

[4] Law Reports, Statutes, 73, Geo. V. 24-24, 1933-1934, Chap. 31, p. 286.

[5] Anglo-German Transfer Agreement July 4, 1934, British Treaty Series, Cmd. 4640, Germany #2, 1934 (Described in Economist, July 7, 1934, pp. 8-9, Statist July 7, 1934, p. 7); Anglo-German Exchange Agreement, Aug. 10, 1934, British Treaty Series, Cmd. 4675 (Described in Economist, Aug. 11, 1934, pp. 263-4, Statist, Aug. 11, 1934, p. 199, and Aug. 18, 1934, pp. 221-2); Anglo-German Payments Agreement, Nov. 1, 1934, British Treaty Series, Cmd. 4726, Germany #26, 1935 (Discussed in Economist, Nov. 3, 1934, p. 824).

Gesetzsammlung 1933, pp. 811-813, Art. 3; and unilateral decrees against Poland (July 14, 1936), against Spain (July 31, 1936) reprinted in Schweizerisches Handelsamtsblatt July 14, 1936, August 1, 1936. Germany itself has passed a law concerning the application of economic measures against foreign countries, Act of July 4, 1934, Reichsgesetzblatt, Part I, No. 74. See also, Belgium: Act of August 8, 1932, Moniteur Belge, August 20, 1932, page 4534, and decree of August 19, 1933, Moniteur Belge, August 21, 1933, pages 4243-4.

The United States, in common with other members of the family of nations, possesses the right and power of self-help. It has been stated by this Court that the exercise of power over international relations "cannot be hampered, when needed for the public good, by any considerations of private interests." *Chae Chan Ping* v. *United States,* 130 U. S. 581, 609. *Cf. United States* v. *Schooner Peggy,* 1 Cranch 103, 109. The conception of a national government which, when faced with defaults upon intergovernmental obligations or discriminations against American creditors, is powerless to act, finds no sanction in the opinions of this Court. As stated by Mr. Justice Sutherland, speaking for the court in *United States* v. *Curtiss-Wright Export Corp.,* No. 98, decided December 21, 1936:

> As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.

The measures taken by the United States in the present case fall far short of the measures which other nations have seen fit to adopt to compel nations to ful-

fill their obligations,[6] and for the purposes of the present case it is quite unnecessary to consider the extent of the power of the United States in this direction. Here it is necessary only to point out that the existence of this power must be considered as qualifying any contract rights which respondent claims. Moreover, the property is still in the possession of the United States. It has been the subject of long continued international negotiations. Under the Treaty of Berlin, the property has been, in a sense, dedicated to the satisfaction of the obligations of the German Government. Under these circumstances, it is difficult to understand how any claimed rights of respondent with respect to

[6] When the Joint Resolution was introduced into the Senate the following statements were made by Senators Johnson and Harrison: MR. JOHNSON. It is a reprisal for the failure of Germany to pay Germany's obligation to the Government. MR. HARRISON. I would not say it is a reprisal, but it is because of the failure of Germany to live up to her agreement in providing funds under the agreement that it is proposed that we withhold any payment to German nationals until after compliance shall have been made by Germany. MR. JOHNSON. With which, Mr. President, I may say I am quite in sympathy. I have observed today the attitude of Great Britain regarding the debts due from Germany to Britain and to British interests, and I am astonished to see, Mr. President, that Great Britain, resenting as she does even the request on the part of this Government for the payment of a debt, is about to engage in real reprisals against Germany because Germany does not pay her debt to Britain, and I am more surprised, sir, to observe that the great internationalist newspapers of this country, which have viewed with such alarm and with such dread and with such hostility a measure which precluded the sale in this country of securities of nations which were in default to our Government, view with equanimity and approval Great Britain's action in reference to Germany's debt. What a marvelous difference it makes whose ox is gored, Mr. President! (Congressional Record of June 16, 1934, p. 12067.)

this property can be said to be *private* property such as the Fifth Amendment is intended to protect.

Respectfully submitted,

STANLEY REED,
Solicitor General.

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Assistant Attorney General.

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January, 1937.

APPENDIX

DEPARTMENT OF STATE
Washington

Address official communications to
The Secretary of State
Washington, D. C.

December 16, 1936.

In reply refer to
Le 311.6253 Deutsche
Bank und Disconto-
Gesellschaft/10

My dear Mr. Attorney General:

Reference is made to a letter from your Department of November 10, 1936, regarding the preparation of the argument on behalf of the United States before the Supreme Court in the case of Cummings and Julian v. Deutsche Bank und Disconto Gesellschaft involving the constitutionality of Public Resolution No. 53 of the 73rd Congress.

In response to the inquiry if any protest has been received from the German Government concerning Public Resolution No. 53 of the 73rd Congress, you are informed that the Department's records show that the German Ambassador called on the Secretary of State on June 14, 1934, and orally complained about the bill introduced in the Senate by Senator Harrison and in the House by Representative Doughton, which was later passed as Public Resolution No. 53, 73rd Congress, and approved on June 27, 1934.

Subsequent to receiving this general oral complaint, which was prior to the enactment of the Resolution,

this Department has not received any written communication from the German Government advancing reasons for its protest of a legal character or otherwise.

Sincerely yours,

(Signed) R. WALTON MOORE,
Acting Secretary.